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In the Supreme Court of the United States

OCTOBER TERM, 1957

RAILWAY EXPRESS AGENCY, INC., PETITIONER

v.

RAILROAD RETIREMENT BOARD, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, AND RAILWAY LABOR EXECUTIVES ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT RAILROAD RETIREMENT BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 908

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT RAILROAD RETIREMENT BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 24–31) is reported at 250 F. 2d 832. The examiner's findings of fact, conclusions of law, and reasons therefor (P. A. 582–804),[1] adopted by the Railroad Retirement Board (P. A. 839–840), are unreported.

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[1] Following the petitioner's usage, we will cite petitioner's appendix in the court below as "P. A." and the respondent Board's appendix in that court as "R. A.". The petition for a writ of certiorari is cited "Pet.", its appendix "Pet. App.".

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958 (Pet. App. 32). The petition for a writ of certiorari was filed April 9, 1958. This Court's jurisdiction is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, as the court below held, the administrative record in this case contains substantial evidence supporting a determination by the Railroad Retirement Board that certain persons concededly performing railway express work for petitioner were in fact its "employees" (rather than "independent contractors") and hence were entitled to the benefits of the Railroad Retirement and Railroad Unemployment Insurance Acts.

STATUTES INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. 228a–228y, the Railroad Retirement Tax Act (formerly the Carriers Taxing Act of 1937), 50 Stat. 437, as amended, 26 U. S. C. (Supp. V) 3201–3233, the Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. 351–367, and the Social Security Act, 49 Stat. 620, as amended, 42 U. S. C. 301, *et seq.*, are set forth in the appendix to this brief, *infra*, pp. 28–34.

STATEMENT

Since March 1929, petitioner Railway Express Agency has operated a nationwide express business (P. A. 10–11). In large part, this business is conducted over the railroads of the United States, and

petitioner has been designated by the railroads as the exclusive agent for the conduct of express business over their lines (P. A. 592–603; R. A. 47, 83). Petitioner is admittedly (Pet. 4) an "employer" for the purpose of the Railroad Retirement Act of 1937, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act. These proceedings were undertaken by the Board to determine whether certain classes of individuals who act as petitioner's agents are "employees" under those Acts.

A. THE CLASSES OF AGENTS

In order to render its services, petitioner maintains 22,000 agencies throughout the country and in Canada, Cuba, Alaska, and Hawaii (R. A. 90). At each agency, the company is represented by an agent in charge of the express office, who transacts the business which petitioner does in the community or area (R. A. 13, 32, 90, 98, 123–125, 128). Less than 10 percent of these agents are salaried (P. A. 47, 379–380; R. A. 3). The Board has divided petitioner's other agents, who serve on a commission basis, into the following five groups (P. A. 605–606):

1. *Exclusive commission agents* are individuals who generally devote their entire working time to express service and who perform their express work on premises under control of a railroad or of petitioner (P. A. 605, 22, 379, 399, 487–488, 504).

2. *Joint agents* are railroad agents (usually station agents) who also serve petitioner as express agents, and who usually, but not always, perform their express work on railroad premises; some joint agents

also have other business interests, such as an insurance, real estate, or feed business (P. A. 605, 36, 126–127, 135, 139, 560–561; R. A. 4, 87–88, 90).

3. *Caretaker or custodian agents* are railroad station caretakers or custodians who also serve petitioner as express agents, and who may or may not have their agency office located on railroad premises; caretaker or custodian agents may also have some other business, such as a grocery store (P. A. 605, 445, 461–462, 506, 512, 552–553, 566–568; R. A. 99–100, 104, 120).

4. *Merchant agents* are individuals serving as express agents, having their agency office located on premises not under the control of petitioner or of a railroad; they generally are engaged in some business or occupation outside the railroad or express business but some are housewives, students, etc., and engage in no business other than that of express agent (P. A. 605–606, 378, 389; R. A. 84–85). Some may incidentally be in railroad service but not as station agents or caretakers or custodians (P. A. 101–106, 429–431; R. A. 38, 144).

5. *Other commission agents* are individuals who are engaged in railroad service other than as station agent or caretaker or custodian, and who perform their express work on premises under the control of petitioner or a railroad; individuals who perform no railroad work, but who operate their express agency on railroad premises under an agreement between petitioner and the railroad; and individuals who conduct their express agency, and perhaps also engage in other business activities, on premises for

which petitioner pays rent to a third party (P. A. 606).[2]

Petitioner concedes that its salaried personnel and those designated "exclusive commission agents" and "other commission agents" are its employees for the purpose of the Railroad Retirement Act and Railroad Unemployment Insurance Act (P. A. 22, 230, 597; R. A. 3). It also concedes that "joint agents" and "caretaker or custodian agents" as a class are its employees (although this concession is stated to be solely for the purpose of this proceeding) (P. A. 230). However, petitioner claims that "merchant agents" (the fourth class above, plus a small number of others[3]) are not its employees (R. A. 90). The application of the Acts to this group alone is involved in these review proceedings.

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[2] The record also contains reference to two other types of agents. "Limited [branch] agents" are actually subagents, within the area of a regular agent. They do not transact general express business but only receive and hold shipments, accept telephone calls, influence students and others to use express service (P. A. 607; R. A. 92, 98, 123). The limited (branch) agents were held by the Board not to be "employees" (P. A. 840, 847–848; *infra*, p. 13) and their status was not involved in the proceeding in the court below or upon the instant petition.

"Fixed allowance agents" receive a fixed monthly amount for representing petitioner and otherwise are the same as other commission agents (P. A. 37, 205–206, 607; R. A. 120). Petitioner considers the allowances as commissions (P. A. 425–426, 818) and the agents may here be treated as included among other comparable commission agents, as petitioner suggests (Pet. 7, n. 3).

[3] Petitioner characterizes as merchant agents all those so designated by the Board and also those joint, caretaker, or custodian agents whose activities for petitioner's express business are not conducted on railroad property nor during their rail-

B. PETITIONER'S MERCHANT AGENTS

In the three hearings on this problem (*infra*, pp. 12–14), the Board has exhaustively examined the relations between petitioner, its merchant agents, and other agents.

In the 1937 and 1938 hearings, petitioner disclosed that, of 20,159 offices in the United States, it had salaried agents at 1,674, joint agencies at 16,769, and merchant agents at 1,469 (P. A. 19, 47, 101–106, 612; R. A. 3, 38–39, 85). Thus, the great majority of agencies are those where the agent is not in petitioner's exclusive employ (P. A. 434; R. A. 14). The type of agent who renders petitioner's service in a particular community will depend upon such factors as the size of the town, the volume of express business, the location of the railroad terminal, and the persons available, *e. g.*, the willingness of a station agent to represent petitioner (P. A. 27, 31, 33, 42, 108, 111, 113, 467–468, 685–686; R. A. 4–7, 9–10, 12–13, 84, 93–94). Nonexclusive agents are used chiefly in the smaller communities where the volume of business would not support a full-time operation but where nevertheless service must be offered as part of petitioner's nationwide business (R. A. 4, 12, 84). While generally it is most convenient to utilize a "joint agent"; *i. e.*, a railroad station agent who

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road working hours (Pet. 6, n. 3; P. A. 552–553; R. A. 144). This is the essential difference between petitioner's classification and the Board's classification.

During the administrative hearings, it was agreed by petitioner that its classification of agents was not binding upon the Board (R. A. 134–135).

transacts express business at the station, this is not always possible or desirable (P. A. 27, 36; R. A. 14, 84). In such cases, petitioner utilizes merchant agents (P. A. 32; R. A. 84, 85).

Of the 1,469 merchant agents described in the earlier hearings, 734 were merchants or storekeepers, 56 were farmers, 53 were housewives, 92 were postmasters and postmistresses, 129 were in the trucking, drayage, or taxi business, 62 operated automobile agencies or service stations, and the remainder were engaged in such occupations as clerk, undertaker, priest, student, insurance salesman, and blacksmith (P. A. 103–105; R. A. 85). As indicated, these agencies usually handle small volumes of express work; at the earlier hearings, it appeared that, in a sample month, more than half the merchant agents had earned less than $10 commissions; about 80 percent had earned less than $50; and 95 percent had earned less than $150 (R. A. 39). On the other hand, fluctuations in business have occasionally resulted in a situation in which certain merchant agents earned more than some exclusive agents (P. A. 26, 105, 194, 385, 401–402).

Generally, the merchant agents do not have any substantial investment in the express agency although those who are regularly engaged in another business sometimes use their business equipment, such as typewriter and vehicles, in express work (P. A. 117-125, 287, 389, 406–413). Petitioner supplies merchant agents with all forms, labels, tags, stationery, etc. and, where needed, also supplies and maintains scales, platform trucks, safe, desk, chair, chests of drawers, glue, metal stamp, and revolver (P. A. 118, 133-134,

144–145, 287, 311, 324, 369, 386, 442, 544, 548, 613; R. A. 91).

Merchant agents generally perform the office part of their express work in their business establishments or homes (P. A. 117, 119, 389, 515). They generally do not devote full working time to express business and petitioner does not specifically set working hours (P. A. 127; R. A. 4). Those otherwise in business usually do express work during regular business hours (P. A. 135–136; R. A. 32–33). However, express moves at all hours of the day and night and agents must meet trains, and load and unload shipments, at times determined by train schedules; if they fail to do so, they will lose their agencies (P. A. 120, 127–129, 136–137, 145–146, 761; R. A. 32–33).

Many of the conditions applicable to the work of merchant agents apply as well to other classes of petitioner's agents. Thus, the above arrangements for working hours also characterize the other non-exclusive commission agents and some exclusive agents, all of whom petitioner concedes to be employees (P. A. 444, 505, 613; R. A. 4). Similarly, all agents are expected to arrange for whatever assistance they need and pay for such help out of their commissions (P. A. 21, 37, 38, 42, 400, 488, 713–714, 817, 818; R. A. 23, 88, 91). While petitioner does not have any standard contract or employment agreement with its agents, all agents, whether merchant, joint, or salaried, complete petitioner's Form 100 "Application for Employment" (P. A. 27, 40, 41, 44; R. A. 91, 92). Merchant agents, and all other commission agents, are not on petitioner's payroll but deduct their commissions before remit-

tance to the petitioner of express charges collected (P. A. 40; R. A. 29). Petitioner's relations with its merchant agents, as with its joint agents, can be terminated at any time by either side (P. A. 41, 44, 613). Merchant agents are, in fact, replaced if they cannot or will not perform essential functions, or if they will not follow instructions (P. A. 132–133, 455, 494; R. A. 8–9).

Moreover, express work is essentially the same whether it is done by an exclusive commission agent or a joint or merchant agent (P. A. 400, 453–454, 461; R. A. 4–5, 22–24). Agencies have often been changed or reclassified by petitioner, as from a merchant agency to a joint or exclusive commission agency or from joint to merchant agency; apparently, this can occur without any substantial change in the service rendered (P. A. 42, 61, 108, 407, 467–468, 424–425; 495, 532; R. A. 4–7, 9–10, 93–94, 144–146). Petitioner's Official Directory lists all its express offices without distinguishing the category of the agency involved (R. A. 124–125, 128).

The similarity in petitioner's relations with its various agencies results from the fact that similar basic express services are performed at all agencies—*i. e.*, receiving out-going shipments from shippers and issuing receipts to them; making up waybills to control the transportation of these shipments to their destination; carrying the shipments, or transporting them by vehicle, to the railroad station platform; meeting trains and loading out-going shipments on them and unloading inbound shipments from them; delivering inbound shipments to the consignee at his address or

at the agency office, and collecting transportation and C. O. D. charges; selling financial paper; making various regular reports and remittances of money to petitioner; maintaining a register of shipments; making out claims for lost or damaged shipments; and performing the pickup and delivery of express, or, where someone else performs this service, maintaining a call book of requests by customers for pickup and delivery (P. A. 33–34, 134–136, 265–266, 337–340, 415, 607; R. A. 32–33). As the record demonstrates, the nature of petitioner's nationwide service and the regulations imposed upon it as a common carrier require that it maintain uniform procedures and closely supervise all its agencies (P. A. 35, 132, 461, 504; R. A. 8, 21).

Agents, including merchant agents, are furnished with a copy of petitioner's "General Rules and Instructions" (P. A. 118, 442; R. A. 85–86). Petitioner has issued two editions of these rules, in 1936 and in 1948; earlier it had utilized the rules published by its predecessor and had issued supplements to them (P. A. 12, 657; R. A. 2, 19–20). The rules contain detailed instructions concerning the operation of the express business by agents, including the manner of completion of receipts and labels, waybills, and other papers; observance of tariff schedules and collection of charges; the packing, loading, and safeguarding of shipments, with special rules for shipments of money; handling of station trucks, scales, safes, and other equipment; and the delivery of shipments including requisite identification of consignees (P. A. 658–669).

All agents, including merchant agents, also receive petitioner's Form 95 "Special Instructions to Agents", containing detailed instructions with regard to the safekeeping of money and financial paper and their remittance to petitioner (P. A. 12–13, 500, 652–654; R. A. 92). They are also bound to follow petitioner's Circular No. 93–A, "General Accounting Instructions for Commission Office" (P. A. 525), and, in handling explosives, to observe pertinent I. C. C. regulations supplied them (P. A. 386–387). Periodically, various circulars and bulletins are sent to agents which often contain instructions with respect to the method of conducting business and admonitions that the rules and instructions must be observed (P. A. 139, 140, 268, 437, 517–518; R. A. 26–28, 31, 35–37, 40–79, 91). Finally, petitioner's Route Agents visit and inspect the various agencies, check upon the observance of petitioner's rules and regulations, and often give verbal instructions concerning the conduct of the business (P. A. 24, 25, 38, 44, 137, 497; R. A. 10, 31). A knowledge of the various rules and instructions is essential to the transaction of express business by all agents, including merchant agents, although some rules were not applicable at agencies whose business did not include specific operations (P. A. 20, 35, 118–119, 133, 137–138, 352, 658, 664–665; R. A. 8).[4]

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[4] The petitioner's "General Rules and Regulations" are preceded by a "Notice to Employees", which states (R. A. 19):

"The Rules, Instructions and Information contained herein are intended for the guidance and use of the Company's employes only. The business of the Company must be transacted strictly in accordance therewith.

C. ADMINISTRATIVE PROCEEDINGS

The administrative proceedings involved here represent the third time that the status of merchant agents has been considered by the Railroad Retirement Board. In 1937 the same question arose under the Retirement Act; at that time, petitioner contended that both "joint agents" and "merchant agents" were equally not covered. (P. A. 229; R. A. 11, 24.) The examiner's report (P. A. 45–97) recommended that joint agents and merchant agents be held to be "employees" under the Act and this conclusion was unanimously adopted by the Board on March 24, 1938 (P. A. 98–99). Upon petitioner's protest, the proceeding was reopened and additional evidence considered. In the second report, the examiner reached the same conclusion with respect to joint agents and merchant agents as classes; however, he believed that

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"Employes must make a thorough study of these Rules and Instructions. The plea of ignorance will not be accepted as excuse for mistakes made in transacting any part of the business.

"These Rules and Instructions are based on the character of forms and the conditions which prevail at the majority of offices. * * *"

The "majority of offices" referred to must mean the non-exclusive commission agencies (*supra*, p. 6).

Similarly, Rules 790 and 794 provide (P. A. 664–665):

"Rule 790. The local agent has jurisdiction over his office and its branches, and authority over employes within his jurisdiction.

"Rule 794. The Company's General Rules and Instructions appearing in this book and Supplements thereto, also Operating Department General Circulars, must be faithfully and uniformly observed in transacting the Company's business."

pickup and delivery service by merchant agents, and the status of individuals where a company was the nominal agent, should be determined according to the facts of the individual case (P. A. 161–199). On August 1, 1939, the Board again ruled as recommended by the examiner (P. A. 200–223).

Since the Board's first decision, petitioner paid railroad retirement taxes, and, after June 30, 1939, unemployment insurance contributions, under protest (P. A. 229–230, 589). In 1946, petitioner brought suit for refund of retirement taxes, after the Bureau of Internal Revenue disallowed its claim (P. A. 229–230, 589). In 1948, the Board again opened the administrative proceeding (P. A. 224–227) upon petitioner's demand for refund of unemployment insurance contributions paid with respect to joint agents, merchant agents, branch agents, and certain others (P. A. 589).

Extensive additional evidence was submitted (reproduced in part at P. A. 229–582; R. A. 89–138). The examiner then rendered his report, thoroughly discussing the law and the evidence, and set out findings of fact, conclusions of law, and recommendations (P. A. 583–804). He recommended, *inter alia*, that merchant agents and their assistants be considered to be "employees" and that petitioner's demand for refund be denied (P. A. 615).[5] After hearing argu-

[5] The examiner similarly held with respect to joint agents, caretaker or custodian agents, and fixed allowance agents. On the other hand, the examiner concluded that limited (branch) agents were not employees and that the contributions with respect to them should be refunded (P. A. 615; see *supra*, p. 5).

ment (P. A. 804–840; R. A. 146–147), the Board, on August 29, 1956, adopted as its own the examiner's findings of fact, conclusions of law, and reasons therefor (P. A. 839–840).

D. THE DECISION BELOW

On petition for review (P. A. 841–848), the Court of Appeals for the Seventh Circuit unanimously upheld the decision of the Railroad Retirement Board (Pet. App. 24–32).

The court first reviewed the various administrative proceedings and the evidence concerning the character of merchant agents and their relations with petitioner. Relying upon the pertinent statutory provisions, the decisions of this Court, and those of the courts of appeals, it held that the administrative determination should not be set aside if it is "supported by substantial evidence, is not arbitrary and has a reasonable basis in law" (Pet. App. 29). It concluded that petitioner had been given every opportunity to present its case in three hearings and in arguments before the examiners and the Board.

It then held, applying the statutory definition, that a merchant agent is an employee "if * * * he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service", citing the provisions of the Railroad Retirement Act (45 U. S. C. 228a (b), (c)), the Railroad Unemployment Insurance Act (45 U. S. C. 351 (d),

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No opinion was expressed with respect to pickup and delivery service performed as part of a general drayage business conducted by an agent or his assistant (P. A. 615).

(e)), and the Railroad Retirement Tax Act (26 U. S. C. 3231 (b), (d)). This statutory definition, the court stated, must prevail if it differs from generally accepted common law tests (Pet. App. 30).

Returning to the evidence, the court ruled that the status of merchant agents was to "be determined on the basis of the entire situation" (Pet. App. 31). The court pointed out that the agents performed continuing express services as an integral, essential part of petitioner's nationwide service and that the nature of petitioner's business makes essential a supervising control of each agent. Referring to petitioner's rules and instructions and other supervisory activities, the court concluded that there was substantial evidence to support the Board's finding that merchant agents were petitioner's employees for the purpose of the Acts (Pet. App. 31).

ARGUMENT

In the decision unanimously upheld below, the Railroad Retirement Board determined, on the basis of detailed findings, that petitioner's merchant agents were its "employees" and hence were entitled to certain benefits. In making that determination, the Board applied a broad statutory criterion to a complex fact situation, after having for the third time held hearings and heard petitioner's evidence and arguments. The record amply supports the Board's conclusion, as the court below held. Moreover, contrary to petitioner's assertion, this case does not present any substantial issue as to the construction of the "employee" definition set forth in the Railroad Retirement and Unemployment Insurance Acts.

There is therefore no occasion for further review of the Board's determination.

1. (a) Under the Railroad Retirement and Unemployment Insurance Acts,[6] a person is an "employee" if he is "in the service" of an employer for compensation; and he is in such service—

> * * * if * * * he is *subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service,* or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations * * *. [Emphasis added.]

The Board is required to determine who is an employee and its findings of fact, "if supported by evidence and in the absence of fraud, shall be conclusive."[7]

In considering comparable administrative authority to ascertain "employee" status, this Court has repeatedly emphasized the deference due to such an administrative determination. "Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the

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[6] Section 1 (b), (c) of the Railroad Retirement Act, 45 U. S. C. 228a (b), (c); Section 3231 (b), (d) of the Internal Revenue Code of 1954 (Railroad Retirement Tax Act), 26 U. S. C. (Supp. V), 3231 (b), (d); Section 1 (d), (e) of the Railroad Unemployment Insurance Act, 45 U. S. C. 351 (d), (e).

[7] Sections 10 (b), 11 of the Railroad Retirement Act, 45 U. S. C. 228j (b), 228k; Sections 5 (c), (f) of the Railroad Unemployment Insurance Act, 45 U. S. C. 355 (c), (f).

record. * * * [W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130–131; *Unemployment Compensation Commission* v. *Aragon*, 329 U. S. 143, 153–154; *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 478. To the same effect, with respect to the Railroad Retirement Board, see *Southern Development Co.* v. *Railroad Retirement Board*, 243 F. 2d 351, 353 (C. A. 8); *Brotherhood of Railway and Steamship Clerks* v. *Railroad Retirement Board*, 239 F. 2d 37, 43 (C. A. D. C.).[8]

(b) The record in the instant case and the examiner's exhaustive consideration of the evidence demonstrate, we believe, that the Board's decision was correct, and that petitioner's merchant agents are its "employees" since they were "subject to [its] continuing authority * * * to supervise and direct the

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[8] In a number of cases, courts of appeals have recognized their limited review function and have sustained the Board's finding with respect to employment relations in a specific situation or at a specific time. *Southern Development Co.* v. *Railroad Retirement Board*, *supra*; *Marmon* v. *Railroad Retirement Board*, 218 F. 2d 716 (C. A. 3); *Lane* v. *Railroad Retirement Board*, 185 F. 2d 819 (C. A. 6); *Dunne* v. *Railroad Retirement Board*, 183 F. 2d 366 (C. A. 7), certiorari denied, 340 U. S. 854; *Monahan* v. *Railroad Retirement Board*, 181 F. 2d 751 (C. A. 7); and *Ellers* v. *Railroad Retirement Board*, 132 F. 2d 636 (C. A. 2).

manner of rendition of [their] service." In any event, it can scarcely be doubted that the Board determination has "'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, supra,* 322 U. S. at 131. The same result has now been reached after three administrative proceedings, and no contrary view has been expressed by any examiner, Board member, or reviewing judge. In the circumstances, since the Court of Appeals clearly has made a "fair assessment" of the evidence underlying the Board's decision, no reassessment by this Court is warranted. See, *e. g., Federal Trade Commission* v. *Standard Oil Co.,* 355 U. S. 396, 401; *National Labor Relations Board* v. *Pittsburgh S. S. Co.,* 340 U. S. 498, 502–503.

The substantial nature of the evidence supporting the Board's finding is indicated in our statement of facts (*supra,* pp. 2–11) and in the summation by the court below (Pet. App. 25–28, 31), and need not be repeated in detail. The merchant agents function as an integral part of petitioner's nationwide operations. Not only does the nature of petitioner's business make it essential that each agent's work be closely supervised and controlled by it, but there was ample evidence to show that petitioner actually exercised supervisory authority over them. Its detailed rules, instructions, and circulars extend to the minutiae of express business—merchant agents are told, for example, how to pull platform trucks and admonished not to slam the door of a safe (P. A. 666, 668).

Significantly, merchant agents are subject to the same kind of supervision and control which are ap-

plicable to salaried personnel and other commission agents whom petitioner admits are its employees (*supra*, pp. 8–11). The tenuousness of petitioner's arguments on the facts is demonstrated by its attempt to assert a distinction between merchant agents and joint agents, *i. e.*, the railroad station agents employed by petitioner (*supra*, pp. 3–4, 5). In the 1937 and 1938 hearings, petitioner argued vigorously that joint agents and merchant agents were similarly situated and that a decision with respect to one would extend to the other (R. A. 22–24). Now, petitioner concedes that joint agents are its employees, but urges that this concession is made only for the purpose of this proceeding and no conclusion can be drawn from it (Pet. 6, 21, n. 15). Quite clearly, however, petitioner's acquiescence with respect to joint agents was required by the numerous intervening decisions of the National Railroad Adjustment Board and the National Mediation Board dealing with joint agents as petitioner's employees (P. A. 677; R. A. 95–96). See also this Court's decision in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 343, recognizing that such joint agents "primarily are employees of the railway and secondarily of the railway express agency." Merchant agents also are "primarily" interested in another business or in the occupation of housewife, student, etc. That this primary interest is not employment by the railroad or on railroad premises can hardly be of material distinction. For, as far as their express work is concerned, they submit to petitioner's authority in the same manner as joint agents; like joint agents, therefore, they are

its employees for purposes of railroad retirement and unemployment insurance.

(c) While petitioner insists at one point that the "entire situation" must be considered (Pet. 22–23),[9] it inconsistently seeks to contest the Board's finding by reliance upon decisions (Pet. 19–20) arising under different statutes and dealing with totally different industries and relationships. These decisions, even apart from the difference in statutes, are readily distinguishable. In *Party Cab Co.* v. *United States,* 172 F. 2d 87, 92–93 (C. A. 7), and *Glenn* v. *Standard Oil Co.*, 148 F. 2d 51, 55 (C. A. 6), the courts expressly stated that the companies' rules did not purport to control the manner in which the taxi drivers and the distributors conducted their independent business, but related only to limited matters of interest to the companies. Similarly, the insurance agent in *Zipser* v. *Ewing*, 197 F. 2d 728, 731 (C. A. 2), had received for general guidance a manual of rules and regulations, but, as the Second Circuit stressed, he was under no obligation to perform any services and his activity

[9] In this connection, petitioner contends that the Board failed to look at the "entire situation" and improperly "atomized" petitioner's relations with the merchant agents (Pet. 21–23). However, the examiner expressly reached his conclusion upon "all the foregoing circumstances" (P. A. 781). The examiner first stated his conclusion (P. A. 696) after generally discussing the facts; he then considered each of petitioner's contentions in relation to the whole situation; it is this analysis, prompted by petitioner's arguments, that petitioner criticizes. The Seventh Circuit recognized that the Board considered "all the activities of the merchant agents" (Pet. App. 31) and its opinion gives no basis for petitioner's statement that the court "rejected" the Board's approach (Pet. 22).

was entirely up to him. In *United States* v. *Silk*, 331 U. S. 704, the rules and regulations were more explicit but this Court pointed out that no attempt had been made actually to impose them upon the truckers; they were considered impractical and were ignored (pp. 710–711, 717, n. 11).

As to the other cases cited (Pet. 14–15), the alleged "employees" were themselves independently engaged to some extent in the same field of business as the alleged employer. Distinguishing between their interest as independent entrepreneurs and as employees could therefore be expected to present close questions. In the instant case, on the other hand, as the Board's examiner pointed out, none of petitioner's agents are in the express business (P. A. 755–759); some, such as housewives, students, etc., engage in no business whatsoever. The relation of all these persons to express work is solely as petitioner's agents. While they earn a commission, they do not act independently on the basis of their own initiative and judgment. For example, all incoming shipments come to them only as a result of petitioner's nationwide system. They must carefully observe petitioner's detailed rules and instructions governing every aspect of their work. A failure of care will be punished not by a loss of custom, typical of the entrepreneur, but by loss of the agency, a discharge typical of the employment situation.

One of the few other businesses in the country whose organization resembles petitioner's is the Western Union Telegraph Co., which also provides

an integrated nationwide service with outlets in all parts of the country. In certain small towns, where the volume of business would not support full-time officers, Western Union made commission arrangements with agents, generally local businesses like hotels, drug stores, bus stations, or insurance offices. It furnished necessary equipment, imposed its detailed rules and regulations and supervised the agents through district superintendents and visiting representatives; an agency would be terminated if the rules were violated. When the question of coverage arose under the Fair Labor Standards Act, the court rejected the contention that these agents were independent contractors. Because of the control exercised by Western Union, it held that these "merchant agents" were its employees. *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65 (C. A. 6), certiorari denied, 333 U. S. 862.[10] A similar result was properly reached here.

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[10] The Sixth Circuit stated (165 F. 2d at 71):

"* * * the evidence in the instant case proves that the Western Union Telegraph Company controlled the methods and means used by its 9A agents in the transaction of the company's public service business.

"Certainly, workers in an agency office of the telegraph company are not withdrawn from coverage of the Fair Labor Standards Act for the reason that some of them are engaged in local retailing work in addition to telegraphic work, or because of the location of the telegraph office in a retail or service establishment. * * *"

Within the last few weeks, a district court has similarly decided that the merchant agents of the petitioner Railway Express Agency in the State of Maine are also "employees" for the purpose of the Fair Labor Standards Act. *Mitchell* v. *Railway Express Agency* (D. Me.), decided April 3, 1958, 34 Labor Cases 96,500, ¶71,434.

2. Contrary to petitioner's contentions (Pet. App. 11–15), the decision below does not present any general issue as to the standard to be applied in determining "employee" status under the railroad statutes.

In cases arising under the Social Security Act, National Labor Relations Act, and the Federal Employers Liability Act, this Court has been called upon to give authoritative guidance and to consider the applicability of common law master-servant criteria, since those statutes do not contain any definition of "employee".[11] See *United States* v. *Silk*, 331 U. S. 704, 711; *National Labor Relations Board* v. *Atkins & Co.*, 331 U. S. 398, 403; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 120–121; *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 480, 483. In contrast, as we have already noted (*supra*, pp. 16–17), Congress explicitly defined "employee" in the Acts here involved and thereby established the standard to be applied by the Board. Indeed, in *United States* v. *Silk*, *supra*, this Court distinguished the instant "carrier employment" from the Social Security situation, pointing to the express

[11] It should be noted that, even under the statutes which left the term "employee" undefined, this Court has decisively rejected the use of common-law criteria, which petitioner urges here. Petitioner concedes this with respect to the Fair Labor Standards Act, the National Labor Relations Act, and the Social Security Act, but incorrectly states that common law tests were accepted under the Federal Employers Liability Act (Pet. 11, n. 5). Recent decisions of this Court reject the common-law master-servant rules under the F. E. L. A. *Sinkler* v. *Missouri Pacific R. Co.*, No. 133, this Term, decided April 28, 1958; *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 431–432; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 507–509.

definition of employee in the Railroad Retirement Tax Act (331 U. S. at 711). And as stated in *Walling* v. *Portland Terminal Co.*, 330 U. S. 148, 150, which involved the Fair Labor Standards Act, a statutory definition supersedes common-law criteria and precludes analogies from other legislation.

In any event, even assuming that in certain situations a substantial question might exist as to the relevance of common-law rules under the railroad acts, this case does not present the question. As the Seventh Circuit stated, the only portion of the statutory definition here at issue is the characterization as an "employee" of any person "* * * subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service * * *" (Pet. App. 30–31). But this provision merely restates a principal element of the common-law rule (Restatement of the Law of Agency, Sec. 220), which has, in fact, been called a "control test". *Bartels* v. *Birmingham*, 332 U. S. 126, 129; *United States* v. *Silk*, 331 U. S. 704, 713; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 120, n. 19. In the instant case, the examiner's report noted that the quoted part of the statutory definition is not substantially different from the common-law standard, although in substitution therefor,[12] and he cited a number of relevant

[12] A definitive statement by Congress was necessary because of the other elements in the statutory definition and because even with respect to control, as the court below stated, there is a considerable "contrariety of opinion" concerning the common law master-servant relation, and no single, accepted formula (Pet. App. 30). The confusion surrounding the

common-law cases in the course of his report (P. A. 627–628, 643–644, 750–759). The record, as previously indicated (*supra*, pp. 17–19), amply shows such control exercised by petitioner over the merchant agents as to satisfy the common-law employment criteria. Accordingly, since petitioner's merchant agents are its "employees," regardless of whether the statutory standard or a separate common-law test is applied, a decision as to the applicable standard is not required.[13]

3. Finally, the holding below does not, as petitioner asserts (Pet. 15–17), represent a threat to the relationship between coverage under the Railroad Retirement Act and under the Social Security Act. This Court has recognized that the Acts have different standards for "employment" and that only the Railroad Retirement Act has an explicit definition. *United States* v. *Silk*, 331 U. S. at 711 (*supra*, pp. 23–24). The "complementary relationship" between the Acts does not depend upon an identity of standards, as petitioner assumes, but upon express statutory provisions in both Acts which exclude from the social security system all those covered by railroad retirement and thus give priority to the definition of

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common-law criteria was noted by this Court. See *United States* v. *Silk*, 331 U. S. at 713–714; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. at 120–121.

[13] The decision below does not imply that the result would have been different had a common-law test been utilized, as petitioner assumes (Pet. 12, 17–20). The court merely said that the statute must prevail "[i]f there is any real difference between the generally accepted common law tests and the statutory definition" (Pet. App. 30).

"employee" in the Railroad Retirement Act.[14] For that reason, no conflict or confusion can be anticipated as a result of this decision. Indeed, petitioner has been paying railroad retirement taxes for its merchant agents since the Board's rulings in 1938 and 1939; yet it fails to show, or even allege, any consequent difficulties during these past twenty years.

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[14] Section 17 of the Railroad Retirement Act, 45 U. S. C. 228q; Section 210 (a) (9) of the Social Security Act, 42 U. S. C. (Supp. V) 410 (a) (9). Moreover, while any specific work is covered only under one of the two Acts, it is also clear that a single employment relation might have coverage divided between Social Security and Railroad Retirement, depending upon the relation of separate items of work to the business of a carrier. *Adams* v. *Railroad Retirement Board*, 214 F. 2d 534 (C. A. 9). The examiner pointed out, citing the Board's Annual Report, that millions of persons had both railroad retirement coverage and social security employment, even in the same year (P. A. 763–765).

It would also be misleading to assume that exclusion of petitioner's merchant agents from railroad retirement would result in alternative coverage under the social security system (Pet. 15–16). Before 1950, the merchant agents would have had no coverage whatsoever, since social security did not then extend to self-employed independent contractors, as petitioner considers them. If petitioner's view were accepted, many of the merchant agents would even now remain outside both systems since their earnings from commissions are apparently too small to meet minimum Social Security requirements. (R. A. 39; 42 U. S. C. (Supp. V) 412, 413 (a) (2) (B).)

CONCLUSION

The decision below is essentially factual in nature. No conflict of decisions or general question of law is involved. Accordingly, it is respectfully submitted that the petition for certiorari should be denied.

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MAY 1958.

APPENDIX

STATUTES INVOLVED

The Railroad Retirement Act of 1937, 50 Stat. 307, as amended, 45 U. S. C. 228a–228y provides in part:

> SECTION 1b [45 U. S. C. 228a (b)].
>
> The term "employee" means (1) any individual in the service of one or more employers for compensation, * * *
>
> * * * * *
>
> SECTION 1c [45 U. S. C. 228a (c)].
>
> An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation, or a method of computing the monthly compensation for such service is provided in section 3 (c) of this Act. * * *
>
> SECTION 10 (b) [45 U. S. C. 228j (b)].
>
> 1. The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments. Decisions by the Board upon issues of law and fact relating to pensions, annuities, or death benefits shall not be subject to review by any other administrative or accounting officer, agent, or employee of the United States.

2. If the Board finds that an applicant is entitled to an annuity under the provisions of this Act or the Railroad Retirement Act of 1935 then the Board shall make an award fixing the amount of the annuity and shall certify the payment thereof as hereinafter provided; otherwise the application shall be denied.

3. The Board shall from time to time certify to the Secretary of the Treasury the name and address of each individual entitled to receive a payment, the amount of such payment, and the time at which it should be made, and the Secretary of the Treasury through the Fiscal Service of the Treasury Department, and prior to audit by the General Accounting Office, shall make payment in accordance with the certification by the Board.

4. The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of such Acts, with power as a Board or through any member or designated subordinate thereof, to require and compel the attendance of witnesses, administer oaths, take testimony, and make all necessary investigations in any matter involving annuities or other payments and shall maintain such offices, provide such equipment, furnishings, supplies, services, and facilities, and employ such individuals and provide for their compensation and expenses as may be necessary for the proper discharge of its functions. * * *

* * * * *

SECTION 11 [45 U. S. C. 228k].

Decisions of the Board determining the rights or liabilities of any person under this Act shall be subject to judicial review in the same manner, subject to the same limitations, and all provisions of law shall apply in the same manner as though the decision were a de-

termination of corresponding rights or liabilities under the Railroad Unemployment Insurance Act except that the time within which proceedings for the review of a decision with respect to an annuity, pension, or lump-sum benefit may be commenced shall be one year after the decision will have been entered upon the records of the Board and communicated to the claimant.

SECTION 17 [45 U. S. C. 228q].

The term "employment", as defined in section 210 of title II of the Social Security Act, shall not include service performed by an individual as an employee as defined in section 1 (b).

The Railroad Retirement Tax Act (formerly the Carriers Taxing Act of 1937), 50 Stat. 437, as amended, 26 U. S. C. (Supp. V) 3201–3233, provides in part:

26 U. S. C. (Supp. V) 3231 (b).

Employee.—For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation * * *.

26 U. S. C. (Supp. V) 3231 (d).

Service.—For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if—

(1) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and

(2) he renders such service for compensation;

* * * * *

The Railroad Unemployment Insurance Act, 52 Stat. 1094, as amended, 45 U. S. C. 351–367 provides in part:

> SECTION 1 (d) [45 U. S. C. 351 (d)].
> The term "employee" (except when used in phrases establishing a different meaning) means any individual who is or has been (i) in the service of one or more employers for compensation, * * *
>
> * * * * *
>
> SECTION 1 (e) [45 U. S. C. 351 (e)].
> An individual is in the service of an employer whether his service is rendered within or without the United States if (i) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and (ii) he renders such service for compensation * * *.
>
> SECTION 5 (c) [45 U. S. C. 355 (c)].
>
> * * * * *
>
> Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly inter-

ested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this Act but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this Act, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own

motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

* * * * *

SECTION 5 (f) [45 U. S. C. 355 (f)].

Any claimant, or any railway labor organization organized in accordance with the provisions of the Railway Labor Act, of which claimant is a member, or any other party aggrieved by a final decision under subsection (e) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Court of Appeals for the Seventh Circuit or in the United States Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the

pleadings and transcript of the record a decree affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

* * * * *

Section 210 (a) of the Social Security Act (49 Stat. 620) as amended, 42 U. S. C. (Supp. V) 410 (a) provides:

> The term "employment" * * * shall not include—
>
> * * * * *
>
> (9) Service performed by an individual as an employee or employee representative as defined in section 1532 of the Internal Revenue Code [26 U. S. C. (Supp. V) 3231];
>
> * * * * *

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